
An Analysis of the Abuse of Dominant Position by the E-Commerce Retailers in India

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Abstract *The topic titled as “An analysis of the abuse of dominant position by the e-commerce retailers in India” seeks to analyse the interface between competition law and the e-commerce sector keeping in view the e-commerce retail market which has been propelled by the rising penetration of smartphones, laptops, the launch of 4G networks and increasing consumer’s wealth followed by an increasing acceptance of the idea of virtual shopping coupled by increasing participation of various enterprises in the electronic sector. However, it is evident that e-commerce has been inciting various set of anti-competitive issues which may be economic or otherwise, consequently calling for the vigilance of the Competition Commission of India. Thus a need arises to analyse the e-commerce sector in the light of the provisions of the Competition Act, 2002. In this regard the research paper seeks to define the e-commerce industry, explains the concept of dominance and abuse of dominant position while simultaneously elaborating upon the various practices amounting to abuse in the e-commerce sector. The research paper has also taken care in analysing the role of the Competition Commission in regulating the e-commerce sector in India by referring to various case laws.*

Keywords *E-commerce; Competition Act, 2002, Competition Commission of India, Dominance, Abuse.*

Introduction

In the last few decades there has been an unprecedented growth in the electronic commerce industry or e-commerce industry on a global scale and India is not an exception to it. This unprecedented growth is on account of mushrooming of internet, growth of start-ups and changing customer behaviour. The market and distribution system has tremendously changed owing to the advent of the e-commerce retail market, as it brings along a vast numbers of buyers and sellers through the medium of World Wide Web. A large number of e-commerce industries such as Ola, Caratlane, Uber, Flipkart, Bigbasket, Snapdeal, Jabong and Myntra are based on internet-backed marketing concepts and provide goods at a very low price as compared to the traditional cement and brick stores. There is a twofold reason for doing so, firstly the e-commerce market is still in its nascent stage in India and in the atmosphere of intense competition they

are doing whatever it takes in order to capture the market share. Hence, the tool used by them to achieve this purpose is price. Secondly, the Indian e-commerce start-ups have private equity funds and investors hence, the companies can afford giving heavy discounts because of the excessive funds. Owing to such heavy discounts the traditional stores are making an effort to catch up by the provision of such services and experiences which have never been offered to the consumers. Despite, such offers these stores witness customers who visit the stores only to see the product physically before making a final purchase online. This factor shows that the balance is tilting towards the e-commerce sector which naturally is a source of tension between the two competing networks, leading to legal complexities which are to be addressed through the antitrust regimes.

The crux behind an antitrust law is to promote a healthy and a positive competition in the

economy and to act as a guard against the misuse of economic power for the welfare of the consumers. In India the Competition Act, 2002 has been enacted which seeks to promote economic democracy in a free market structure by prohibiting abuse of dominant position among other things and creates a Competition Commission of India, which is entrusted with the obligation of preventing practices having adverse effect on the competition, the promotion and sustainment of competition enforcing and ensuring freedom of trade and protection of the interest of the consumers along with conducting inquiry in case of violation of the provisions of the act and the imposition of the penalty. However, with the growth of the e-commerce sector the role of the Commission as a regulator represents a new paradigm.

E-Commerce Sector-Defined

The electronic commerce or e-commerce simply defined means the sale and purchase of products (goods and services) over an electronic medium such as the internet. It is an emerging model of a selling and merchandising tool in which the buyers are able to participate in all phases of a purchase decision, while going through the processes electronically and not physical as done in the store. The various processes involved in the electronic commerce include access of product information to the customers, selection of items for the purpose of purchase, secure purchase of items and the financial settlement of the purchase made. There is no universally accepted definition of e-commerce but, in general it can be used to signify a mode of conducting business through electronic means against the traditional means such a business needs internet enabled computer, laptop, smart phones for the purpose of facilitation of 'click and buy' method of business.

Concept of Abuse of Dominance

Section 4 of the Indian Competition Act talks about abuse of dominance or dominant position by an enterprise or a group of enterprises. The act prohibits the utilisation of market

controlling positions by individual enterprises or a group as a preventive measure from out casting competing businesses from the market and dictating prices.

Section 4 (1) of the Competition Act prohibits any enterprise or group from abusing its dominant position.¹ Such a provision of the act lays down two major requirements firstly, the enterprise must enjoy a dominant position and secondly, the enterprise must abuse its dominant position. However, dominance in itself cannot constitute an abuse and hence is not prohibited. It is only the abuse of dominant position that has been prohibited by the act. As per Section 2 (a) (i) and (ii) of the Competition Act abuse of dominant position takes place when the enterprise or the group directly, or indirectly, impose unfair and discriminatory-

- A). conditions in purchase or sale of goods or service; or
- B). price in purchase or sale including predatory price of goods or service.

However, it is noteworthy to state that the dominant position must be acquired by legitimate means such as product innovation, superior production quality or distribution techniques or by virtue of greater entrepreneurial efforts. The material consideration in determining the existence of dominance is not that there shall be an increase in price or the exclusion of competition but the power of hiking price or excluding competition when the enterprise has the desire to do so.²

Hence, determination of dominant position is based on two main factors-market share and entry conditions. The Competition Commission of India has also identified certain conditions while determining the dominant status of agreements as per Sections 19 of the Competition Act. In the case of *Eastman Kodak Co. v. Image technical Service Inc.*³ it was observed that dominant means market power, which is the

1. The Competition Act, 2002 (Act 12 of 2003).

2. *American tobacco Co. et al vs. United States* 328 US 781.

3. 504 US 451.

power to force a purchaser to do something that he would not do in a competitive market. But in majority of the cases the market power is sought on the basis of the functional characteristics of the products and on the behavioural pattern of the consumer.

Sometimes, the market shares of specialised streams of Internet-based businesses are unavailable and the self-detailed data discharged by the market won't be reliable and solid, in such a case market shares may be required to be determined on the basis of the specially commissioned market reports, but such a report must follow a steady technique of information gathering, examination and investigation.

In the case of *Direct-to-home (DTH) Services Case*⁴ it was argued by the informant that each of the DTH operators were acting as individual dominant firms in the relevant market and hence, had abused their position of dominance. Such a contention was however, rejected by the Commission on the basis that each and every player in any important market can't be said to have predominance predictable philosophy of information accumulation, investigation and examination. Thus, the DTH operator were said to have dominant position as per the provisions of the act. It was also observed by the Commission that the concept of dominance does not revolve around the reality of impressive market control which can be practiced just by a solitary endeavour or a little arrangement of market players.

Hence, in order to establish as to whether an enterprise acquires dominant position or not and in case if it is in a dominant position whether or not it is abusing its dominant position. Thus, the following factors must be established-

- A). Define the relevant market, since dominance cannot exist in an abstract but in relation to a market where the establishments compete.

- B). Assessing the market strength with a view to discover if the undertaking possesses a certain level of market power.
- C). Considering the question as to whether the conduct of the undertaking leads to an abuse of dominant position.

Relevant Market

According to the explanation (a) of section 4 of the Competition Act, dominant position must be enjoyed by an enterprise or a group of enterprise in the relevant market making it necessary to define relevant market. Section 2(r) of the act defines relevant market as a market which the Competition Commission of India may determine with reference to the relevant product market or the relevant geographic market or with reference to both the markets.⁵

In the context of e-commerce, there are two distinct markets-online markets and offline markets where the online market by itself can be regarded as a relevant market. In this regard it is worth mentioning the approach made by the CCI in the case of *Mr. Mohit Manglani v. M/s Flipkart India Ltd. & Ors.*⁶ where the question that whether the e-portals market may be regarded as a different pertinent item advertise or as a negligible sub-fragment of the market for dissemination was left open. However, the position was clarified by the CCI in the case of *Mr. Asish Ahuja v. Snapdeal.com*,⁷ where the CCI clearly stated that both the markets are different in matter of discount and purchase experience. In such cases the consumers look for the options available in both the markets and thereby, decide accordingly. In case if the price of the goods in the online market has elevated significantly, then there is a likelihood that the consumer will shift towards the offline market and vice-versa. On the basis of such reasoning the Commission is of the opinion that the two markets-online and offline, are divergent channels of distribution of the like product and not two different relevant markets.

4. *Consumer Online Foundation v. Tata Sky Limited*, Case No. 02 of 2009.

5. The Competition act, 2002

6. Case No. 80 of 2014.

7. Case No. 17 of 2014.

Defining of relevant geographic market in case of the e-commerce industry is based upon the assessment whether the offline retailers or sellers are available with a defined service or product or not. The World Wide Web is a giant network interconnecting numerous smaller networks and defies any location which can be identified with external boundaries. Hence, the geographic market cannot be subjected and confined to the clients of a specific administration because there are other people also who access the internet and at the same time there are other means by virtue of which advertisements to other people can be made.

The relevant geographic market can be defined by using the customer's or the merchant's location as a usable matching tool. Such geographical segmentation aids in the efficient distribution of online goods and services simultaneously allowing customisation. For instance the conditions of demand and supply of online cabs will vary from one place to another.

Competition Concerns in the E-Commerce Sector

The e-commerce sector adopts various innovative steps and methods to establish a consumer base and for the acquisition of the market, in this process it adopts various methods which raise competitive concerns such as exclusive arrangements, online sales and discounts as well as advertisements schemes.

Treatment of Exclusive Arrangements and Minimum Resale Price

A market comprises of a large number of dealers and distributors, however the choosing of exclusive dealers/distributors and the refusal to deal with other market players has been the medial of conflict under competition law. So far as the e-commerce sector is concerned the issue has been constantly surfacing in multiple ways.

Today's modern day economy witnesses that certain products belonging to specific brands are available for purchase only through e-retailers. To cite an example cell phones belonging to the brand Motorola and MI are

available only through online specific shopping sites. Adopting such a practise may be at the disposal of the manufacture with a view to contact a more extensive group of onlookers in a savvy way, yet the counter aggressive impacts of such game plans and concerns with respect to dispossession of market for other market players keep on predominating. A similar issue had emerged before the CCI in the case of *Mr. Mohit Manglani v. M/s Flipkart India Pvt. Ltd. & Ors.*⁸ in relation to the sale of the book titled "Half Girlfriend" written by Chetan Bhagat, which was available for sale exclusively at flipkart. It was alleged that such an arrangement was destroying the other players in the physical market and leading towards the creation of item particular restraining infrastructure in this way, advancing control of value, control of the creation and supply, burden of terms and conditions which may be inconvenient to the enthusiasm of the shoppers and prompt the bending of reasonable rivalry in the commercial centre.

However, such allegations were rejected by the CCI which opined that a selective plan between a maker and an e-gateway would not make any entry obstructions since products sold via online portals face competitive constraints. Thus, in the opinion of the CCI mobile phones, tablets, books, cameras etc., are not to be trodden by imposing business model or predominance. Moreover, there was lack of a concrete evidence to show that it was by reason of the exclusive agreements that any of the existing players were getting adversely affected. The CCI opined that the new era of online business went with the passage of new e-entries into the market, rivalry just gives off an impression of being developing and lessening against aggressive concerns.

The lead of producers in their limitations/refusal to manage online stages/conveyance verticals is another point of concern. Through internal policies the companies have been forcing bans on online guarantees or sending fliers to their merchants teaching them

8. Case No. 80 of 2014.

not to give the fabricated items on the web. Lenovo and Nikon in the past one year have been issuing public statements stating that e-tailers do not qualify as their authorised agents. However, some of the statements have been withdrawn while there are some retailers such as the Snapdeal which has been witnessed approaching the CCI against such discriminatory treatment.

There are also instances where the companies can refrain their dealers from dealing with online players. In a case, a complaint had been instituted against Snapdeal and the company Scandisk by a dealer since it was compelled to acquire a No Objection Certificate (NOC) from the manufacturer in the absence of which it was unable to list its products on its online platform. The CCI opined that the practise of requiring the NOC cannot be regarded as abusive since each entity has the right to protect the sanctity of its distribution channels. It also stated that brand image and goodwill in a quality driven market are important concerns.⁹

However, a different stand was taken by the CCI in the case of *Snapdeal v. Kaff Appliances*,¹⁰ where a suit was instituted by Snapdeal against a manufacturer which had placed restrictions on its dealers in their dealings with e-retailers. It was alleged by Snapdeal that Kaff Appliances, had imposed a blanket ban on providing after sale warranties with regards to products purchased online from unauthorised sellers. It was contended by Snapdeal that the ban had no justification and led to the total deprivation of consumer choice and also causing the violation of Section 3(4) (d) of the Act. In this case it was held by the CCI that the conduct of the Kaff Appliances was by its very nature a unilateral policy and involved coercion.

The divergence in decision of the CCI is indicative of the paradigm shift in the approach made by the CCI with regards to

the policy of restriction in relation to online sale and distribution and also highlights the bolder stand taken by the CCI in comparison to other jurisdictions.

Maintenance of minimum sale price is also another point of contention in the e-commerce sector. It is only in limited instances that the issue on ensuring parity between online and offline sellers, has risen before the CCI yet it remains pivotal with regards to future analysis. In the case of *ESYS v. Intel Corporation & Ors.*,¹¹ Intel was alleged of dictating the retail price of its products. However, the Commission held that a company can monitor its downstream market's price and such an act would not amount to be anti-competitive. The CCI in a case had clarified that offering of distinctive discount to distinct consumers i.e., less discount to retail buyers and a greater discount to bulk buyers are not to be construed as being violative of Section 3 (4) of the Act.¹²

However, in the case of *M/s Ex Enterprise Solutions India Pvt. Ltd v. M/s Hyundai Motor India Limited*,¹³ it was concluded by the CCI that confinements forced by Hyundai on the most extreme reasonable rebate that might be given by a merchant to the end-client, combined with the act of value observing by the Hyundai wherein the merchants were punished by virtue of any deviation added up to a resale value support infringing upon Section 3.

Hence, it can be said that under the ambit of the Competition Act, 2002, resale price maintenance (RPM) is neither legal nor illegal but its validity needs to be analysed by the application of the rule of reasoning in the light of pro versus anti-competitive effects.

Online Sales and Discounts

Online shopping portals offer a large number of discounts such as Black Friday

9. *Ashish Ahuja v. Snapdeal and Anr.*, Case No. 17 of 2014

10. Case No. 61 of 2014.

11. Case No. 48 of 2011.

12. *M/s Shubham Sanitarywares v. Hindustan Sanitarywares & Industries (HSIL) Ltd. Ors.*, Case No. 99 of 2013.

13. Case No. 36 of 2014.

deals in the US, Big billion day and Diwali offer in India to lure consumers and expand their consumer base. Simultaneously such acts of the online players have also invited the fury of the traditional offline sellers who are lamented by decreasing sales as the customers visit the market just to have a physical look of the products reducing the shops to mere showrooms for customer display and inquiry whereas, the actual purchase is usually made through online platforms since they offer anti-competitive cheaper prices.

Against such anti-competitive practices numerous instances have been recorded before the CCI against several online players such as Flipkart, Snapdeal, Amazon, Jabong and Myntra alleging predatory pricing. But in the Flipkart Case¹⁴ the CCI at the prima facie level rejected the claim since none of the players enjoyed dominance in the retail market and in order to prove predatory pricing it is fundamental to show that the enterprise has a dominant position in the market. The determination of dominance is connected to the refusal made by the CCI to designate e-market as a different space of goods/services.

In the case of *M/s Fast Track Call Cab Private Limited v. ANI Technologies*,¹⁵ it was alleged that Ola was providing incentives, loyalties, rebates, predatory discounts. Here, the Commission noted that the act of Ola of providing heavy discounts to its purchasers and bonus to its employees at the cost of bearing loss seems to be a well devised plan of the enterprise formulated to exclude other market players out of the relevant market. This case shows that there has been a transit in the attitude of CCI with regards to the protection of the traditional taxi service providers.

Advertisement Schemes in E-Commerce Space

E-commerce enterprises basically operate in online spheres, hence their visibility,

brand name and promotion is necessary for their growth hence, the Competition law provides the necessary tool to showcase their visibility in the market place. In this context it is noteworthy to state that several e-commerce enterprises such as Microsoft, Yahoo, Facebook, Yatra, Nokia's Here Maps etc had been requested by the Director General (DG) to provide their comments with regards to the investigation of abuse of dominance against Google. Google being one of the most popular search engines has been alleged to abuse its dominance by offering its own maps, places, Google+ social network which was aiming to compete with Facebook. The DG in this regard has laid down various grounds on the basis of which Google is said to abuse its dominance. These points are as follows:

1. The unfair imposition of conditions on the sellers to whom Google is selling its services;
2. Reducing and confining technical and scientific development with regards to goods and services to the prejudice of the consumers;
3. Constraining dominant companies from involving into practices leading in the denial of the market access in any manner;
4. Constraining a dominant company from utilising its position of dominance in one relevant market with a view to enter into, or guard, other relevant markets.¹⁶

Conclusion

The intervention of competition law in the e-commerce sector meets multiple purposes. It seeks to promote the equality between the e-commerce enterprises and the traditional bricks and mortar companies and dealers. However, it is suggestive that the CCI should take into account the unique features of the e-commerce sector such as rapid technological advancement,

14. *ibid*

15. Case No. 06 of 2015.

16. Editorial, "Why did CCI write Google a bad report card?" Live Mint, September 2, 2015.

increasing returns, network effects, data collected from the users while analysing the position of dominance and abuse.

The CCI should also employ the essential facilities doctrine for mandating compatibility between a dominant player and the other market operators. It can also be said that time has come for reviewing and amending the Competition regime to keep pace with the rapidly changing new economy.

Thus, it can be said that despite of the universality of problems of competition policy

the Indian competition law can be said to have created enough space so as to allow the novel and creative organizations to enter the market and offer more options to the customers and organizations. Simultaneously, the interest of the traditional bricks and mortar companies is also being safeguarded by the competition regime as it seeks to provide protection from the harmful effects caused by the e-commerce firms. A check-and balance mechanism has also been brought into play in the e-commerce sector which prevents them from practising unfair pricing.